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I Made Andi Arsana

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GOOD FENCES MAKE GOOD NEIGHBOURS: CHALLENGES AND OPPORTUNITIES IN FINALISING MARITIME BOUNDARY DELIMITATION IN THE MALACCA STRAIT BETWEEN INDONESIA AND MALAYSIA

I Made Andi Arsana, Ph.D*

Abstract

Maritime boundary issues are by no mean new for Indonesia and Malaysia. Notwithstanding the fact that Indonesia and Malaysia signed a maritime boundary agreement as early as 1969, the two States have yet to finalise various pending maritime boundaries between them. Compelling cases such as Ambalat Block dispute (2005, 2009), Tanjung Berakit incident (2010) another incidence in the Malacca Strait (April 2011) and others maritime boundary issues are apparently consequences of unfinished maritime boundaries between Indonesia and Malaysia. This paper seeks to analyse challenges and opportunities in finalising maritime boundaries in the Malacca Strait between Indonesia and Malaysia. It focuses on description of maritime boundaries between the two States, followed by recent developments in the Malacca Strait. An incident involving Indonesian patrolling officers and Malaysian-flagged fishing vessels which occurred on 7 April 2011 is the key case discussed. It is viewed as a relevant representation of what happen between Indonesia and Malaysia, which also applies to other areas where maritime boundaries are pending or absent. This discussion eventually highlights the importance of maritime boundary delimitation in the Malacca Strait between Indonesia and Malaysia. Options for maritime delimitation between Indonesia and Malaysia in the Malacca Strait are the main outcomes of this paper. This is achieved by taking into consideration principle of the law of the sea, relevant jurisprudence, and existing agreement between Indonesia and Malaysia. To accurately generate options for delimitation, geospatial approach was employed by utilising relevant geospatial data and technical tools and operations.

Keywords: *maritime boundary delimitation, Malacca Strait, law of the sea, geospatial*

I. INTRODUCTION

Due to its geographic location Indonesia shares maritime areas with at least ten States: India, Thailand, Malaysia, Singapore, Vietnam, Philippines, Papua New Guinea, Palau, Australia and Timor Leste.¹ Indonesia needs to settle maritime boundaries with these ten States and has

* Author is a lecturer in Geodesy and Geomatics, Gadjah Mada University in Yogyakarta, Indonesia. He can be reached at madeandi@ugm.ac.id

¹ Oegroseno, A.H. 2009. "Indonesia's maritime boundaries", in: Robert Cribb and Michele Ford (eds), *Indonesia beyond the water's edge; Managing an archipelagic state*, pp. 49-58. Singapore: ISEAS.

managed to establish some boundary segments with eight of them. Two States for which no maritime boundaries have been settled with Indonesia to date are Palau and Timor Leste. As per March 2015, Indonesia has yet to finalise maritime boundaries in at least 10 different locations with more than 15 segments to accomplish.²

Pending maritime boundaries have been proven to be one of the sources of problems between Indonesia and its neighbours. Among those ten neighbours, issues with Malaysia seem to be most frequent. Compelling cases such as the Ambalat Block dispute (2005, 2009),³ Tanjung Berakit incident (2010)⁴ an incidence in the Malacca Strait (April 2011)⁵ and recent issue related to the construction of a light in Tanjung Datu⁶ are apparently consequences of pending maritime boundaries between the two States. Accordingly, finalising maritime delimitation should be prioritised.

A classic boundary making theory prescribes that there are four essential steps in boundary making: allocation, delimitation, demarcation and administration.⁷ Allocation deals with political activities to define allocation of territory where parties concerned agree on a broad divi-

² The calculation was conducted by the author after taking into account the two last agreements between Indonesia and the Philippines (23 May 2014) and between Indonesia and Singapore (3 September 2014).

³ For an analysis on Block Ambalat dispute, see for example: Arsana, I.M.A. 2010. "The settlement of the Ambalat block case through maritime delimitation; A geo-spatial and legal approach [in Indonesian]", *Jurnal Ilmiah Widya Sosiopolitika* Vol. I No. 1 (June): pp. 46-58.

⁴ For an analysis on Tanjung Berakit incident and option of maritime delimitation in the area, see: Arsana, I.M.A. 2011. "Mending the imaginary wall between Indonesia and Malaysia - The case of maritime delimitation in the waters off Tanjung Berakit", *Wacana, Journal of the Humanities of Indonesia*, Vol. 13 No. 1 (April 2011)

⁵ Arsana, I.M.A. 2011. "Understanding the Malacca Strait Incident", *The Jakarta Post*, 14 April, Jakarta.

⁶ Ministry of Foreign Affairs. 2014, Indonesian Foreign Minister reports on the development of ASEAN and achievement of Indonesian diplomacy in the Region. [*Di Komisi I, Menlu RI Sampaikan Perkembangan ASEAN dan Capaian Diplomasi RI di Kawasan*], available at <http://www.kemlu.go.id/_layouts/mobile/PortalDetail-NewsLike.aspx?l=id&ItemID=171e0b11-0ca4-4919-8bea-f9f6e7f0c5fd>

⁷ Jones, S. B. 1945. *Boundary-making: A Handbook for Statesmen, Treaty Editors and Boundary Commissioners*. Washington DC, Carnegie Endowment for International Peace.

sion of territory, thus establishing ‘spheres of influence’. Delimitation is the next step, where parties involve political, legal and technical experts to decide on a precise alignment of the boundary and illustrate the line on maps/charts. At this stage, a treaty is drawn up. After delimitation on maps/charts, demarcation is required on the ground. The points and lines agreed in the delimitation stage are transferred from the maps/charts to the ground where it is physically marked with pillars, posts, fences, etc. Demarcation is conducted to define coordinates through survey activities using adequate technology, equipment and method. For the field survey, the role of geodetic surveyors is essential. The use of sophisticated technology and scientific approach is a must to achieve accurate position of the border points.⁸ At this stage, collaboration between the two neighbouring States during the establishment of border points is inevitable. The word ‘demarcation’ is however rarely applicable to maritime boundaries because maritime boundaries are rarely amenable to being physically marked. The last step is administration and management of boundaries involving activities to maintain the points and lines that form the boundaries by the neighbouring states. Not only that, administration relates to the management of people’s activities around boundary area. In the case of maritime boundaries, the administration step mainly deals with navigational activities such as transportation and fishing around border areas.

In the case of Malacca Strait, Indonesia and Malaysia are dealing with delimitation step in boundary making, especially for the water column. Seabed boundary was agreed upon in 1969 and the water column boundary is currently under negotiation.⁹ This suggests that entitlement of seabed and resources therein has been made clear but not that of water column. Consequently, rights of States (Indonesia and Malaysia)

⁸ Arsana, I.M.A. and Sumaryo 2010. “Geospatial Aspects of Indonesian International Maritime Boundaries in the Context of Border Management [Aspek Geospasial Batas Maritim Internasional Indonesia dalam Pengelolaan Wilayah Perbatasan]”. Managing Indonesian Boundaries in a Borderless World: Issues, Problems, and Policy Options [Mengelola perbatasan Indonesia di dunia tanpa batas: isu, permasalahan, dan pilihan kebijakan] L. Madu, A. Nugraha, N. Loy and Fauzan. Yogyakarta, Graha Ilmu.

⁹ The 27th technical meeting between Indonesia and Malaysia with regards to maritime boundary delimitation was conducted on 26-28 February 2015 in Jakarta. See: http://pustakahpi.kemlu.go.id/content.php?content=file_detailinfo&id=94

on the utilisation of oil and gas have been clarified but not that of fish.¹⁰

Even though maritime delimitation has yet to be finalised in the Malacca Strait, each State has laid their EEZ claim. As a result, each has issued maps showing their respective unilateral claims. Unsurprisingly, the lines that the States have claimed do not coincide with each others claims and also overlap in some instances. Indonesia believes that the overlapping maritime area falls within Indonesia's jurisdiction and so does Malaysia. Interestingly, both States conduct law enforcement in the area based on their respective unilateral claims. Activities conducted by Malaysian fishermen in the area will be viewed as an infringement by Indonesia and vice versa. Agreed and pending maritime boundaries in the Malacca Strait between Indonesia and Malaysia are illustrated in Figure 1.



Figure 1 Agreed and pending maritime boundaries in the Malacca Strait

¹⁰ To understand different regimes of maritime zone of jurisdictions, see: United Nation Convention on the Law of the Sea, particularly Part V (EEZ) and Part VI (Continental Shelf).

II. MARITIME CLAIMS AND BOUNDARIES

Before stepping into the Singapore Strait case, it is worth recalling the principle of maritime claims and boundary delimitation. These following subsections describe how a coastal State can claim maritime area, and where maritime delimitation is required.

A. Maritime Claims

The United Nations Convention on the Law of the Sea 1982 (hereinafter is referred to as Law of the Sea Convention, LOSC) is the latest and most comprehensive convention on the law of the sea.¹¹ The Convention has been ratified by 161 States plus one European Union.¹² LOSC established a number of maritime zones, each of which assigns different exclusive rights and control to coastal States. The zones are territorial sea, contiguous zone, Exclusive Economic Zone (EEZ) and continental shelf. Each maritime zone is measured seaward from baseline,¹³ with different breadth for each zone. The limit of territorial sea is 12 nautical miles (M)¹⁴ from baseline,¹⁵ while contiguous zone is measured up to 24 M seaward from baseline.¹⁶ EEZ's breadth is defined beyond territorial sea up to 200 M.¹⁷ Unlike other maritime zones, the breadths of which are specific in dimension, the breadth of continental shelf does not only depend on distance criteria. The outer limits of the continental shelf also consider the geology and geomorphology of seabed. Accordingly, LOSC does not specify fixed breadth of the continental shelf, which can reach up to 350 M or more.¹⁸

¹¹ United Nations Convention on the Law of the Sea, open for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994). The convention is also known as UNCLOS, abbreviation of United Nations Convention on the Law of the Sea.

¹² Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 03 June 2011. Available at <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>

¹³ LOSC, Articles 5, 7, 9, 10, 11, 12, 13, and 47

¹⁴ In this paper, nautical mile is abbreviated as M. 1 M = 1,852 metres.

¹⁵ LOSC, Article 3

¹⁶ LOSC, Article 33 (2)

¹⁷ LOSC, Article 57

¹⁸ LOSC, Article 76

B. Introducing maritime boundary delimitation

With such a geographical situation, it is hard to find a coastal State that can claim a full suit of maritime zones without having overlapping claims with its neighbours. To be able to fully claim EEZ, for example, distance of a coastal State from its neighbours must be more than twice the breadth of EEZ, which is 200 M, from the baseline. For the case of continental shelf, the distance required may be even more. However, this situation does not impact the way the breadth of maritime zones are theoretically measured from baselines. Considering the geographical location of coastal States in the world and the configuration of their coasts, overlapping claims of maritime zones among coastal States is inevitable (see Figure 2). Accordingly, maritime boundary delimitation is required.

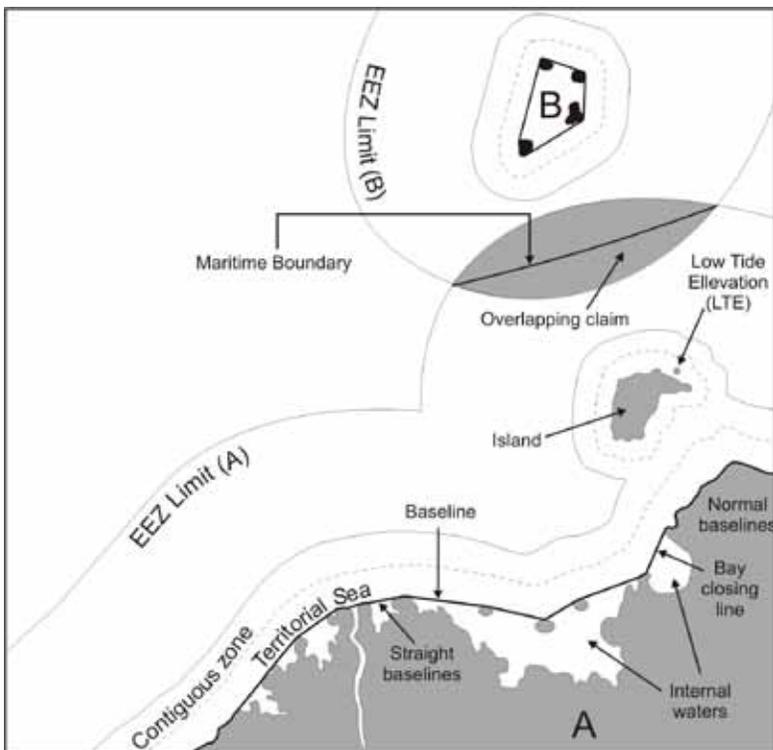


Figure 2 Principle of maritime boundary delimitation
(Source: After Carleton and Schofield (2001: 53))

The process of maritime boundary delimitation between two or more coastal States is governed by the principles and rules of public international law.¹⁹ Maritime boundary delimitation is usually resolved either through negotiation among affected parties or by submission of the case to the third party.²⁰ This third party can be arbitrators, mediators, courts or tribunal such as International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS).

Figure 2 shows that overlapping claim takes place in EEZ and continental shelf because distance between State A and B is less than 400 M but is more than 24 M. Should the distance between those two neighbouring States be less than 24 M then their territorial sea will overlap one another. Figure 2 also illustrates that maritime boundary delimitation can be required for territorial sea, EEZ, or continental shelf, depending on the distance between States in question. In this regard, rules governing maritime boundary delimitation for those different zones are also different.²¹

III. INDONESIA-MALAYSIA MARITIME BOUNDARIES

Indonesia started maritime boundary negotiations with its neighbours in the 1960s and signed the first maritime boundary agreement with Malaysia. Since then, various maritime boundary agreements were agreed with its neighbours until the latest one with Singapore was signed on 3 September 2014.²² As of March 2015, 19 agreements have been in place and three agreements, the 1997 Indonesia-Australia

¹⁹ Prescott, V. and Schofield, C. 2005. *The maritime political boundaries of the world*. Second Edition. The Hague: Martinus Nijhoff. [First edition 2004.]

²⁰ Above note 17

²¹ Arsana, I.M.A. 2007. *International Maritime Bondaries: A Technical and Legal Perspective [Batas Maritim Antarnegara: Sebuah tinjauan teknis dan yuridis]*. Yogyakarta: Gadjah Mada University Press.

²² Ministry of Foreign Affairs. 2014, RI-Singapore signed maritime boundary agreement for the Eastern Part of the Singapore Strait [*RI-Singapura Tanda Tangan Perjanjian Garis Batas Laut di Timur Selat Singapura*], available at http://www.kemlu.go.id/_layouts/mobile/PortalDetail-NewsLike.aspx?l=id&ItemId=8ffe392c-64cd-4501-bf73-cea2b093a06d

EEZ agreement,²³ the 2014 Indonesia-the Philippines²⁴ agreement and the 2014 Indonesia-Singapore agreement²⁵ have not entered into force because they are yet to be ratified. Figure 3 shows Indonesia's settled maritime boundaries in area relevant to this paper (around the Malacca Strait, Singapore Strait, and South China Sea).



Figure 3 Indonesia's settled maritime boundaries with its neighbours in the Malacca Strait, Singapore Strait, and South China Sea

(Source: visualisation by the author using Google Maps and publically-available coordinates of maritime boundary points)

The first maritime boundary agreement was on seabed boundary with Malaysia in the Malacca Strait and South China Sea signed

²³ Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries. See Prescott, VJR. 2002. Australia-Indonesia, Report Number 6-2(6) in Charney J.I. and Smith R. W. (eds) *International Maritime Boundaries*, pp. 2714-2727, Martinus Nijhoff Publishers, the Netherlands

²⁴ Official Gazette of the Republic of the Philippines, 2014, Philippines and Indonesia sign agreement on Exclusive Economic Zone Boundary, Available at < <http://www.gov.ph/2014/05/23/philippines-and-indonesia-sign-agreement-on-eez-boundary/>>

²⁵ See above note 22

on 27 October 1969.²⁶ The second agreement is the territorial sea boundary in the Malacca Strait signed on 17 March 1970 in Kuala Lumpur.²⁷ Indonesia and Malaysia are currently undertaking maritime boundary negotiation for four different locations: the Malacca Strait (EEZ), the Singapore Strait (territorial Sea), South China Sea (EEZ) and Sulawesi Sea (territorial sea, EEZ and continental shelf).²⁸

Indonesia and Malaysia have yet to delimit EEZ boundaries in the northern part of the Malacca Strait, where distance between the two States is more than 24 M.²⁹ The issue that seem to be faced by Indonesia and Malaysia in the delimitation is that Indonesia likely to favour that the EZZ boundary line should not coincide with the existing seabed boundary. It is likely that Indonesia will propose the use of equidistance line in the delimitation to establish an equitable EEZ boundary for the two neighbours. Accordingly, the EEZ line will lie at the Malaysian side of the seabed boundary line. In constructing the equidistance line for EEZ boundary, Indonesia apparently gives full effect to its relevant archipelagic baselines in the Malacca Strait. This view is clearly expressed in the latest Map of the Republic of Indonesia (Peta NKRI) issued in 2013 depicting Indonesia's forward position concerning maritime boundaries. It is clear that the proposed EEZ line lies at the Malaysian side of the 1969 seabed boundary.³⁰

In accordance to Peta NKRI 2013, Indonesia has also defined a Fisheries Management Area through the Ministry of Marine Affairs and Fisheries (MMAF)'s Regulation number 1 of 2009, which is also known as Wilayah Pengelolaan Perikanan (WPP).³¹ The outer limits of

²⁶ For a complete documentation of the agreement, see: Park, Choon-ho. 1993. Indonesia- Malaysia (Continental Shelf) in Charney J.I. and Alexander L.M. (eds) *International Maritime Boundaries*, pp. 1025-1027, Martinus Nijhoff Publisher, the Netherlands

²⁷ Above note 1, p. 55

²⁸ See above note 9

²⁹ See also R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malaysia: An International Law Perspective* (London: Kluwer Law International Ltd, 1998), pp. 23–32.

³⁰ Badan Informasi Geospasial. 2013. Map of the Republic of Indonesia [*Peta Negara Kesatuan Republik of Indonesia*]

³¹ MMAF 2009. Ministry of Marine affairs and Fisheries' Regulation number 1 of 2009. At http://www.infohukum.kk.go.id/files_permen/PER%2001%20MEN%20

the WPP, as shown on the accompanying map, coincide with Indonesia's territorial sea or EEZ limits, either agreed, unilaterally-defined or unilaterally-claimed. Maritime areas in the Malacca Strait are included in a Fisheries Management Area of WPP-571 enclosed by Indonesia's proposed EEZ boundary line in the Malacca Strait. Fishing activities conducted by Indonesian fishermen are based on the WPP map.

On the other hand, Malaysia seems to prefer a single boundary line for seabed and EEZ, as depicted in its 1979 Map (also known as Peta Baru 1979).³² Meanwhile the EEZ boundary as proposed by Indonesia lies somewhere in the north of the 1969 seabed boundary. Accordingly, there is maritime space where these two States have overlapping claim over EEZ, which complicate the management of resources in the area, including fish. In addition, it seems that Malaysia has been operating in the Malacca Strait as if the EEZ boundary has been established, coincident with seabed boundary. For instance, Malaysian fishermen have been fishing in the water beyond its territorial sea claimed (depicted in the 1979 Map) up the 1969 seabed boundary line. Accordingly, Malaysia's fishermen were often captured by Indonesia's maritime enforcement agency in this disputed area. The Malaysian fishermen, especially those of Hutan Melintang, located on the western coast of Peninsular Malaysia, came to the area closed to Indonesia because of the depleting fish resources in Malaysian waters, while the resources in the Indonesian side of the Malacca Strait is relatively underexploited.³³ Adding further problems to the complexity, the fishermen often utilised environmentally-unfriendly equipment such as bottom trawl to exploit resources in the area.³⁴ However, the use of bottom trawls is largely unselective in terms of fish catches and destructive for the seabed. Consequently, this type of fishing leads to ecologically unsustainable fishing practices in the Malacca Strait. On the other hands, Indonesian fishermen, who fish

2009.pdf (Accessed on 22 March 2011).

³² Director of National Mapping, Rampaian 97, Cetakan 1-PPNM; Notification of a New Map of the Continental Shelf of Malaysia, Jil. 23, No. 26, Tambahan No.1, No.5745, 21 December 1979.

³³ Num, M.J. 2009. Pirates, Barter Traders, and Fishers: Whose Rights, Whose Security? User Conflicts and Maritime Nontraditional Security in Malaysian Waters in Laipson, E. and Pandya, A. *The Indian Ocean - Resource and Governance Challenges*, The Henry L. Stimson Center, Washington, p. 21

³⁴ Above note 30

in accordance to WPP Map the same area, are also often captured by Malaysian patrolling officers.

The aforementioned incidences are, among other things, the reasons why certainty of maritime boundaries, especially EEZ, in the Malacca Strait is vital. Indonesia and Malaysia need to negotiate more intensively to achieve a final and binding “equitable solution”³⁵ for them. Notwithstanding the fact that these two States have different views regarding EEZ boundaries in the Malacca Strait, it is a fact that EEZ boundary has yet to be bilaterally delimited. Soon after an agreement is achieved, Indonesia and Malaysia can conduct more effective utilisation and management of marine resources within area assigned to each of them. As stated in the LOSC, a State’s EEZ would endow the State with “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil”.³⁶

IV. THE 7 APRIL 2011 INCIDENTS

An incident took place on 7 April 2011 involving Malaysian-flagged vessels, Indonesian patrolling officials from Ministry of Marine Affairs and Fisheries and Malaysian helicopters.³⁷ Indonesian patrolling team identified two vessels fishing allegedly illegally in Indonesia’s exclusive economic zone (EEZ). When the two vessels were seized, three Malaysian helicopters appeared on-site demanding that the two vessels be released. Convinced with what they were doing, the Indonesian officials went on and disregarded the demand. The two vessels were brought to Belawan Port in Indonesia and fishermen operating the vessels were detained.³⁸

Even though this may be seen as a successful effort by the Indonesian officials in preventing foreign fishermen from fishing illegally

³⁵ As required by Article 74 of the LOSC governing the EEZ boundary delimitation.

³⁶ LOSC, Art. 55 (1) (a)

³⁷ MMAF. 2011. Press Release: Again, illegal fishing vessels seized [*Kembali, kapal illegal fishing ditangkap*]. Available at <<http://www.kkp.go.id/index.php/mobile/arsip/c/4336/KEMBALI-KAPAL-ILLEGAL-FISHING-DITANGKAP/>>

³⁸ *Ibid*

in Indonesian waters, Malaysia's response by sending three helicopters did spark protest and anger in Indonesia. As anticipated, the issue was highly debated in Indonesia and was prominently featured in national news headlines. It is interesting to observe that news in Indonesian media generally analysed non technical-legal aspects of the issues and focused on the conflict-prone relationship between Indonesia and Malaysia. This case was easily related to other issues by some parties, which in fact has nothing to do with maritime dispute, such as unlawful treatment given by several Malaysians to their Indonesian maids.³⁹

By observing coordinates of the fishing vessels in question,⁴⁰ it is clear that the incident took place in an overlapping area of EEZ between Indonesia and Malaysia (see section 3) as illustrated in Figure 4. As previously highlighted, unilateral claims by Indonesia and Malaysia generate an overlapping area of EEZ in the Malacca Strait. In fact, there has been no EEZ boundary in the northern part of the Malacca Strait between the two States. Hence, it is legally impossible to judge whether or not fishermen activities in the northern part of the Malacca Strait are infringement to international maritime boundaries. Having observed this, infringement committed by the Malaysian-flagged vessels was in fact viewed from Indonesia's perspective with its unilaterally-claimed EEZ boundary line. Likewise, the presence of Indonesian patrolling officials is also viewed as a border crossing by Malaysia.

³⁹ This can be found in various offline and online discussion forums, mailing list, blog postings and also newspapers.

⁴⁰ Coordinates were obtained from a press release by MMAF. See above note 33



Figure 4 Incident in the Malacca Strait on 7 April 2011

(Source: visualisation by the author using Google Maps and publically-available coordinates of maritime boundary points and location of incidents)

Indonesian officials captured the two Malaysian-flagged vessels as shown in Figure 4 because they considered the EEZ boundaries in the Malacca Strait is the one claimed by Indonesia. On the other hand, the Malaysian helicopter team viewed that the fishing vessels were operating within their EEZ because they based their operation on Malaysia's 1979 map showing Malaysia's unilateral claim. In line with this view, the helicopter team was likely to be of the view that the Indonesian patrolling vessel entered Malaysian EEZ. Put simply, both patrolling teams were operating based on their own maps which showed their respective unilateral claims in the absence of a bilaterally agreed maritime boundary line.

V. MARITIME DELIMITATION IN THE MALACCA STRAIT

As previously highlighted, the main purpose of this paper is to provide options of maritime delimitation in the Malacca Strait between

Indonesia and Malaysia. Analysis provided here is purely scientific without any political intervention/agenda. The delimitation options, therefore, do not represent the view of any government or institution.

A. Legal Basis

When the seabed boundary in Malacca Strait was signed by Indonesia and Malaysia in 1969, the concept of EEZ had not yet been recognised in international law of the sea. EEZ concept was adopted formally for the first time under LOSC in 1982.⁴¹ Accordingly, at the time when the 1969 seabed agreement was signed, Indonesia and Malaysia did not sign any other agreement concerning water column delimitation in the Malacca Strait beyond territorial sea of each State. By the official recognition of EEZ concept in the LOSC, a delimitation of EEZ in the Malacca Strait was possible. Considering that the longest distance between the coast line of Malaysia and Indonesia in Malacca Strait is less than two times 200 M,⁴² delimitation is required for the whole area of Malacca Strait, from the northern part up the southern part. In the southern part where distance between the two States is less than 24 M,⁴³ delimitation of territorial sea EEZ delimitation is governed by Article 74 of the LOSC consisting of four paragraphs. EEZ delimitation is aimed at achieving “an equitable solution” based on “international law, as referred to in Article 38 of the Statute of the International Court of Justice.”⁴⁴ If States in question fail to make an agreement “within a reasonable period of time,” they shall conduct a settlement of dispute as provided for in Part XV.⁴⁵ Article 74 also governs that States in question shall attempt to establish a “provisional arrangements of a practical nature”, which “shall be without prejudice to the final delimitation.”⁴⁶ It is worth noting that if there is an existing agreement between States in question, the new EEZ agreement “shall be determined in accordance with the provisions of that agreement.”⁴⁷

⁴¹ For more information regarding the development of LOSC, see: The United Nations Convention on the Law of the Sea (A historical perspective). Available from <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm>

⁴² Measurement is on British Admiralty Chart. and Google Maps

⁴³ Measurement is on British Admiralty Chart. and Google Maps

⁴⁴ LOSC, Article 74 (1)

⁴⁵ LOSC, Article 74 (2)

⁴⁶ LOSC, Article 74 (3)

⁴⁷ LOSC, Article 74 (4)

One important thing in Article 74 of LOSC is that it does not specify any method to achieve the so-called “equitable solution”. It can be inferred from this provision that the method can be ‘anything’ as long as it is accepted by States in question. However, there are methods that States in question can employ to facilitate the achievement of the solution such as equidistance line or median line. It is worth noting that the principle of equidistance can produce an equal division of maritime space. While equal maritime space is not necessarily equitable, it certainly can serve as an equitable solution.⁴⁸ In addition, equidistance or median line has relatively high degree of certainty since it is generated based on the application of strict geometric principles, provided that parties in question agree on baselines involved in the delimitation.⁴⁹ Another provision to consider from Article 74 is that Indonesia and Malaysia shall attempt to establish a provisional agreement in the Malacca Strait if they cannot achieve a solution within a reasonable period of time. However, it is not clear how Indonesia and Malaysia should define the phrase “reasonable period of time”. This is certainly subjective and it is up to the States in question to define. It seems that both States have not seen that they have passed a “reasonable period of time” without agreed EEZ in the Malacca Strait, thus they have not established any provisional agreement.

With regard to the provision that EEZ should not be in violation to existing agreement, it does not seem that this is applicable to Indonesia and Malaysia. The 1969 agreement is on seabed boundary and it has nothing to do with EEZ agreement. Therefore, the 1969 agreement shall not be used in any way to dictate the future agreement on EEZ. Having had a seabed agreement in place, it is worth nothing that the future EEZ agreement will solely deal with water column even though theoretically EEZ, according to the LOSC, also encompasses seabed.⁵⁰ Accordingly, the existing agreement will eventually affect the future EEZ agreement in a sense that the agreed EEZ boundary will not govern seabed area and resources therein.

⁴⁸ Above note 17, p. 236

⁴⁹ Beazly, P. B. 1994. *Technical Aspects of Maritime Boundary Delimitation*, Maritime Briefing, Vol. 1/2, International Boundary Research Unit: Durham

⁵⁰ LOSC, Article 55 (1) (a)

B. Existing Agreement and Baselines Issues

The 1969 seabed boundary between Indonesia and Malaysia in the Malacca Strait lies considerably closer to Indonesia than to Malaysia. Geospatial analysis of the boundary shows that there is a possibility that Malaysia employed straight baselines in the construction of the boundary. However, there is no official publication of Malaysia's straight baselines and scholars usually only infer the use of such straight baselines.⁵¹ One of the relevant publications is the 1979 map,⁵² which does not depict baselines but does show the outer limits of Malaysia's territorial sea.⁵³ Location of baselines can be inferred by pulling lines at a distance of 12 M from the outer limits of territorial sea landward. It shows that Malaysia is suspected to employ straight baselines connecting, among others, Pulau Perak and Pulau Jarak, two small islands located in the Malacca Strait at around 80 and 36 M from the Malaysian peninsula, respectively.⁵⁴

A considerably comprehensive analysis reveals that the baselines of Malaysia in the Malacca Strait are invalid for several reasons.⁵⁵ It stated that the designations of such baselines and territorial sea claims as depicted in the 1979 are invalid because they have "breached both the 1958 Geneva Convention and the Vienna Law of Treaties Convention." The basepoints and baselines used "do not conform to 1982 UNCLOS Article 7." In addition, the designations and claims "restricted the rights of third-party states". Malaysia, according to the analysis, also published public documents and undertook actions inconsistent with its claims.⁵⁶ In the delimitation of pending maritime boundaries in the Malacca Strait, this issue of baseline is one of the important aspects to consider.

⁵¹ Forbes, V.L., *Indonesia's Maritime Boundaries*, *op. cit.*, p. 22. See also: Valencia, M. J., 2003, *Validity of Malaysia's baselines and territorial sea claim in the northern Malacca Strait*, *Marine Policy* Vol. 27 pp. 367-373

⁵² Above note 29

⁵³ Valencia, M. J., 2003, *Validity of Malaysia's baselines and territorial sea claim in the northern Malacca Strait*, *op cit* p. 369

⁵⁴ Measurement on relevant British Admiralty Chart and Google Maps

⁵⁵ Above note 48

⁵⁶ Above note 30, p. 367.

C. EEZ Delimitation

As for the method of delimitation, it does not seem that equidistance is unacceptable in establishing EEZ boundary in the Malacca Strait. Considering that Malaysia has not made any official publication/declaration concerning its straight baselines, it will be, to an extent, acceptable that Malaysia is considered to employ normal baselines.⁵⁷ In other words, should a coastal States not make any other claims, the coastal State will have normal baselines, which are coincident with the low-water line along its coast.⁵⁸ Accordingly, one of the options in EEZ delimitation in the Malacca Strait is by considering Malaysia's normal, instead of straight, baselines. On the other hands, Indonesia, as an internationally-recognised archipelagic State, is entitled to employ its archipelagic baselines. This use of baselines in constructing maritime boundary line will consequently make the EEZ boundary lies on the Malaysian side of the 1969 seabed. This view seems to be taken by Indonesia as expressed in its official map issued in 2013,⁵⁹ where the EEZ boundary claimed by Indonesia is drawn on the Malaysian side of the 1969 seabed line.

It is worth noting, however, that even though Malaysia has yet to declare its straight baselines, there is always possibility for Malaysia to do so and relevant provision in the LOSC allows that. An analysis of potential baselines suggests that it is possible for Malaysia to employ straight baselines in the Malacca Strait and off the northeast and southeast coast of Sabah.⁶⁰ This indicate that Malaysia might come up with a different proposal with regards to EEZ delimitation in the Malacca Strait compared to what Indonesia proposes or prefers.

With regard to the role of small islands in maritime delimitation, Malaysia has an island called Pulau Jarak located in an 'inconvenient' position of the potential median line between Indonesia and Malaysia. Being a relatively small island, Pulau Jarak should not give a disproport-

⁵⁷ Beckman, R., and Schofield, C. 2009. "Moving Beyond Disputes Over Island Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait", *Ocean Development & International Law*,40:1,1 — 35

⁵⁸ See the definition of normal baselines in Article 5 of the LOSC.

⁵⁹ Above note 27

⁶⁰ Forbes, V. L., 2007, "The Territorial Sea Datum of Malaysia." *MIMA Bulletin* 14: 3-8.

tionate effect to maritime delimitation and this is recognised in international case law.⁶¹ The International Court of Justice has also decided cases involving small islands/rocks such as the North Sea Continental Shelf case,⁶² Tunisia/Libya,⁶³ Libya/Malta,⁶⁴ and Qatar v. Bahrain.⁶⁵ The decisions indicate that the equitableness of the maritime boundary resulting from the application of the equidistance line principle depends on whether the precaution is taken of eliminating the “disproportionate effect” caused by small features such as islets, rocks, and coastal projections along the coast.⁶⁶ As an option in EEZ delimitation, Pulau Jarak can be ignored (given nil effect) in the creation of robust median line.⁶⁷ In the next step, the existence of Pulau Jarak can modify the robust median line in such a way that it generates part of a circle of territorial sea measured from Pulau Jarak (see Figure 5). This is similar to EEZ delimitation between Indonesia and Australia in the Timor Sea in 1997. The existence of Pulau Pasir/Ashmore Reef modifies equidistance line based on which the 1997 EEZ boundary was established. Ashmore reef

⁶¹ See also: Lowe, V., Carleton, C., and Ward, C. (2002) In The Matter of East Timor’s Maritime Boundaries Opinion. Accessed from <http://www.petrotimor.com/lglop.html> on 10 July 2010.

⁶² International Court of Justice. 1969. “North Sea continental shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement of 20 February 1969, The Hague, The Netherlands”; accessed from <http://www.icj-cij.org/docket/files/52/5561.pdf> on 21 September 2011.

⁶³ International Court of Justice. 1982. “Case concerning the continental shelf (Tunisia/Libyan Arab Jamahiriya), Judgement of 24 February 1982, The Hague, The Netherlands”, accessed from <http://www.icj-cij.org/docket/files/63/6267.pdf> on 22 September 2011.

⁶⁴ International Court of Justice. 1985. “Case concerning continental shelf (Libyan Arab Jamahiriya/Malta), Judgement of 3 June 1985, The Hague, The Netherlands”, accessed from <http://www.icj-cij.org/docket/files/68/9573.pdf> on 20 September 2011.

⁶⁵ International Court of Justice. 2001. “Case concerning maritime delimitation and territorial questions between Qatar and Bahrain, Merits, Judgement of 16 March 2001, The Hague, The Netherlands”, accessed from <http://www.icj-cij.org/docket/files/87/7027.pdf> on 24 September 2011.

⁶⁶ Shi, J. 2010. “Maritime delimitation in the jurisprudence of the International Court of Justice, Chinese Journal of International Law Vol. 9 No. 2 (June): 271-291.

⁶⁷ Pulau Jarak is located at 03° 58’ 40” N, 100° 06’ 06” E with a size of only 0.08 square kilometers an uninhibited. See: Malaysia Beneath the Waves, accessed from http://www.mir.com.my/potpourri/places/mpwong/destination/pulau_jarak.htm on 14 October 2011

causes the form of maritime pouch in such a way that the pouch is located on the Indonesian side of median line.⁶⁸

Unilateral claims of EEZ boundary by Indonesia and Malaysia can also be viewed as forward position of each party. This can be considered as a starting position held by each State to begin with in conducting negotiation on EEZ delimitation. As a nature of negotiation, each party will attempt to convince other party to agree upon its proposal. Indonesia, undoubtedly, will do whatever it takes to persuade Malaysia to accept its proposal and the same approach will be carried out by Malaysia. In a negotiation, it is worth recalling that it is rare indeed that a negotiation results in one participant gaining everything and the other nothing.⁶⁹ In other words, there is possibility that the final agreement achieved by Indonesia and Malaysia will follow neither Indonesia's nor Malaysia's claim. Possibility to generate a compromised line based on both their forward positions may become an option accepted by both parties.

In a negotiation anything can happen and anything can be proposed. The question is how one party can convince the other. Indonesia for its part will undoubtedly attempt as hard as possible to convince Malaysia to accept its proposal. From one perspective, Indonesia's position may be viewed acceptable since it is based on equidistance principle. Even though equidistance line is not necessarily equitable, equidistance line can certainly serve as an equitable solution provided that there is no special circumstances to consider.⁷⁰ Meanwhile, Malaysia may defend its position for, among other things, a practicality reason. It is true that management will be significantly easier if Indonesia and Malaysia agree upon an EEZ boundary that coincides with existing seabed boundary. However, practicality shall not ignore a more important consideration, which is legal aspect that requires a solution to be equitable.⁷¹

By considering LOSC, jurisprudences based on ICJ's decision on similar cases, and state practices, Figure 5 illustrates possibilities of EEZ boundary between Indonesia and Malaysia in the Malacca Strait.

⁶⁸ See for example: Prescott, V. 1997. "The completion of marine boundary delimitation between Australia and Indonesia", *Geopolitics* Vol. 2 No. 2 (Autumn): 132–149

⁶⁹ Schofield, C. and Arsana, I M. A. 2005. "Ambalat revised: The way forward?", *The Jakarta Post*, 9 June 2005, Jakarta, Indonesia

⁷⁰ Above note 17

⁷¹ LOSC, Article 74

VI. CHALLENGES AND OPPORTUNITIES

A. Challenges

The main challenge in delimiting EEZ in the Malacca Strait between Indonesia and Malaysia is in balancing the legality and equitability proposed by Indonesia and practicality reason of Malaysia. Undoubtedly each party will attempt to stick to its own position and therefore negotiations may take a long time to finish. Another challenge is the fact that law enforcement has been carried out in the area based on unilateral claim. This has become something that people in the field take for granted. For patrolling officials from Indonesia and Malaysia, the unilateral claim has become 'law' that they have to obey since that is what they are ordered to follow. It is a challenge to change this mindset for the sake of achieving a bigger goal.

For Indonesia, another critical challenge is also to provide sufficient information to the public regarding maritime boundary delimitation so that people have better understanding concerning the process. It is evident that people are relatively easily instigated by border issues since it is strongly related to nationalism. Disproportional response from the people often causes chaotic situation that can indirectly hamper the progress of negotiations by the two States. The challenge for the Indonesian government is to achieve a balance between the provision of sufficient information to the public and the maintenance of a sufficient level of confidentiality in the process of delimitation. Undoubtedly, not every single issue regarding maritime delimitation negotiation can be made available to public.

The next challenges are those related to management when delimitation has been finalised. Having observed possible options highlighted earlier, it is likely that EEZ boundaries is not coincident with seabed boundary. The arrangement, should it be agreed by Indonesia and Malaysia, will create a maritime space in which the seabed fall within Malaysia's sovereign rights, while waters are under the control of Indonesia. This will certainly affect the exploration and exploitation of natural resources in the Malacca Strait. This potential complication is similar to that in the Timor Sea due to different EEZ and seabed boundary

lines between Indonesia and Australia.⁷² One of the common sources of problems is the lack of understanding among fishers on what constitute sedentary species that belongs to continental shelf and therefore are not subject to be taken in fishing activities.⁷³ In the area where EEZ are under Indonesia's control while seabed is under Malaysia's, sedentary species should not be taken by Indonesian fishers. However, due to lack of understanding and also the unselective use of fishing equipment, sedentary species such as sea cucumbers may be taken accidentally. In the case of Indonesia-Australia EEZ boundaries in the Timor Sea, it is identified that problems arise due to, among other things, the fact that there are different line for seabed and water column boundaries.⁷⁴

To minimise conflict due to lack of understanding, there must be clarity in the future agreement concerning the definition of sedentary species agreed by both parties, by particularly listing specific species included in the agreement. The list should include, but not be limited to, specific and common species in the area that are likely to be the subject of fishing activities. In other words, the agreement should specify detailed information on sedentary species in addition to the general definition given by the LOSC. Secondly, information dissemination is essential for Indonesian and Malaysian fishers about the boundaries themselves and the agreement concerning sedentary species. Not only that, this dissemination is also important for law enforcement agencies in Indonesia and Malaysia. It is worth noting that in Indonesia alone, there are several institutions responsible for patrolling maritime boundary areas such as Ministry of Marine Affairs and Fisheries, the Indonesian Navy, and Police force. Effective information dissemination regarding maritime boundary and related agreements can ideally enhance coordination and cooperation among those institutions.

⁷² Herriman, M. and M. Tsamenyi. 1998., "The 1997 Australia-Indonesia maritime boundary treaty A Secure Legal regime for offshore resource development?", *Journal of Ocean Development and International Law* 29: 361-396.

⁷³ Article of LOSC states that sedentary species are "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

⁷⁴ Fox, J. J. 2009. *Legal and Illegal Indonesian Fishing In Australian Waters* ", in: Robert Cribb and Michele Ford (eds), *Indonesia beyond the water's edge; Managing an archipelagic state*, pp. 218-219. Singapore: ISEAS.

B. Opportunities

The occurrence of incidents like the one on 7 April 2011 attracted attention of media, people and government. While this may be seen as a cause of chaotic situation in Indonesia or Malaysia, the incident can be viewed as a 'blessing in disguise' in terms of focussing on maritime boundary issues. This should be seen as an opportunity to accelerate maritime delimitation in the area. Now negotiating teams in Indonesia and Malaysia can find more convincing reasons why EEZ delimitation should be prioritised. Fixed maritime boundary is essential to prevent or at least to minimise incidents and to promote responsible utilisation of maritime resources in the Malacca Strait.

Indonesia and Malaysia are two neighbours with a lot of similarities. Culture, language, and the major religion that they share are opportunities for them to accelerate delimitation process. Those similarities can ideally be beneficial to build confidence and trust between the two States that will eventually facilitate more effective and efficient communication between them. Good communication should be able to minimise misunderstanding so that the two States can focus on issues that matter the most to achieve final solution.

Indonesia's extensive experiences in settling maritime boundaries with eight neighbours (India, Thailand, Malaysia, Singapore, Vietnam, the Philippines, Papua New Guinea, and Australia) are also a positive factor for maritime delimitation in the Strait of Malacca. With such experience Indonesia may be able to adopt best practices of maritime delimitation it has been through and implement them in maritime delimitation negotiation with Malaysia. Indonesia should be confident enough to initiate and lead the process while maintaining respect to Malaysia's role. Relevant parties from both States should work hand in hand and do everything in their power to achieve an equitable solution of EEZ boundary in the Malacca Strait.

Now with Indonesia focusing more on maritime issues as proposed by President Joko Widodo's administration, maritime boundary delimitation has a significantly stronger support. In order for Indonesia to be a "maritime axis of the world" it should ensure its sovereignty and sovereign rights over maritime area. Therefore, maritime boundary delimitation with its neighbours has never been more urgent. This politi-

cal support will eventually hoped to accelerate the process of maritime boundary delimitation between Indonesia and its neighbours, including Malaysia.

VII.CONCLUSION

Indonesia and Malaysia have yet to settle an agreed EEZ boundary in the Malacca Strait. For Indonesia, it is one of the approximately 15 pending maritime boundary segments to settle, scattered in around 10 different locations. Even though no maritime boundary has been agreed in the Malacca Strait, Indonesia and Malaysia have declared their unilateral claims which to an extent overlap one another, generating an area of EEZ claimed by both States. Interestingly, Indonesia and Malaysia conduct law enforcement in the Malacca Strait based on their unilateral claim. Accordingly, Malaysian fishermen's presence in the overlapping EEZ will be viewed by Indonesia as an infringement and vice versa. An example of this is the 7 April 2011 incident involving Indonesian officials, Malaysian-flagged vessels and Malaysian helicopters. After about four years of the incident, EEZ boundary remains pending.

Finalising maritime delimitation is one of the ideal solutions in order for Indonesia and Malaysia to avoid or at least minimise maritime conflict in the Malacca Strait. This is an important agenda, along with delimitation of other pending maritime boundaries in Singapore Strait, South China Sea and Sulawesi Sea. At the time of writing this paper (March 2015), the two States are currently in the process of negotiations which take place in Malaysia or Indonesia. Around 27 negotiations have been conducted, even though not all of them were primarily for maritime delimitation in the Malacca Strait.⁷⁵

Three main options of EEZ boundaries that Indonesia and Malaysia can consider are Indonesia's proposal, Malaysia's proposal and another option as a compromise between the two proposals. Indonesia's proposal is based on equidistance principle, while Malaysia prefers the EEZ line to coincide with the existing seabed boundary signed in 1969. Even though both parties will undoubtedly attempt to persuade other party to agree upon its own proposal, it is not surprising if both eventually agree

⁷⁵ See above note 9

on a third option which is a compromised line between both proposals. The final line agreed by Indonesia and Malaysia will undoubtedly depends on the negotiation process and how both parties take into account relevant factors such as the use of baselines and consideration given to relevant small islands around the region. Regardless of the result of negotiations in the future, it is likely that both States prefer negotiations to achieve resolution as opposed to other channels such as mediation, arbitration and litigation. However, bringing the case to a third party is certainly not impossible if the negotiation fails to achieve mutual agreements between Indonesia and Malaysia. Previous experiences in dealing with ICJ in the case of sovereignty dispute over Pulau Sipadan and Ligitan⁷⁶ (Indonesia-Malaysia) and the case of Pedra Branca, Middle Rock and South Ledge (Malaysia-Singapore)⁷⁷ should to an extent influence decision whether or not to bring the case to a third party. At the time of writing, all remain to be se

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⁷⁷ International Court of Justice. 2008. "Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgement of 23 May 2008, The Hague, The Netherlands", accessed from <<http://www.icj-cij.org/docket/files/130/14492.pdf>> on 15 October 2011.

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